

# Negligence: Review

---

Dr. Steiner

---

# Defining the Standard of Care

- The standard of care measures the duty owed
  - Standard of care is the level of expected conduct that is required under the circumstances
  - The most common standard is that of the reasonably prudent person, which is an objective standard
-

# The Reasonably Prudent Person

Negligence is the failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

--Texas Pattern Jury Charge



---

# The Objective Standard of the Reasonably Prudent Person



- Because of objective standard, defendant can't defend actions as the best that could be expected from a person with poor judgment or limited intelligence
  - A defendant is expected to know things that a reasonably prudent person would know
-

# Child's Standard of Care



- A child typically is judged by a child's standard of care, which examines what "an ordinary prudent child of the same age, experience, intelligence, and capacity" would have done



- A child, however, is judged by an adult standard when engaged in adult activities for which adult qualifications are required or are inherently dangerous

# Elderly Standard of Care



- Seniors are held to an ordinary adult standard of care
- Old age can be considered when it's the cause of physical infirmity (then standard is one of reasonable person with same or similar infirmity)
- Mental infirmity isn't considered

---

# Physical Disabilities and the Reasonably Prudent Person

- The standard of care will reflect the defendant's physical qualities
  - A defendant with a physical disability is held to the standard of a reasonably prudent person with that disability
  - E.g., a blind person's conduct will be judged against a reasonable blind person under the same or similar circumstances
-

---

# Mental Deficiency and the Standard of Care

- Restatement (majority) position: mentally deficient persons are liable for torts, and are judged by the standard of a reasonable prudent person of ordinary intelligence and rationality
  - Some jurisdictions consider whether mental disability suddenly incapacitated defendant from conforming conduct to that of a reasonable person
-



# Custom and Industry Practice



- Evidence of custom and industry practice may be used as evidence of what a reasonably prudent person would do (both sword and shield)
- Custom is relevant as a “composite judgment” about the risks of situation and required precautions

# Custom and Industry Practice



- Evidence of custom and industry practice is relevant, but isn't conclusive on establishing negligence
- Custom can lag behind what reasonably prudent person would do (*T.J. Hooper*)

# Medical Standard of Care



- Plaintiff must prove physician's conduct deviated from recognized (customary) medical practice
- What's the proper standard of medical care?
  - Strict locality
  - Same or similar communities
  - National

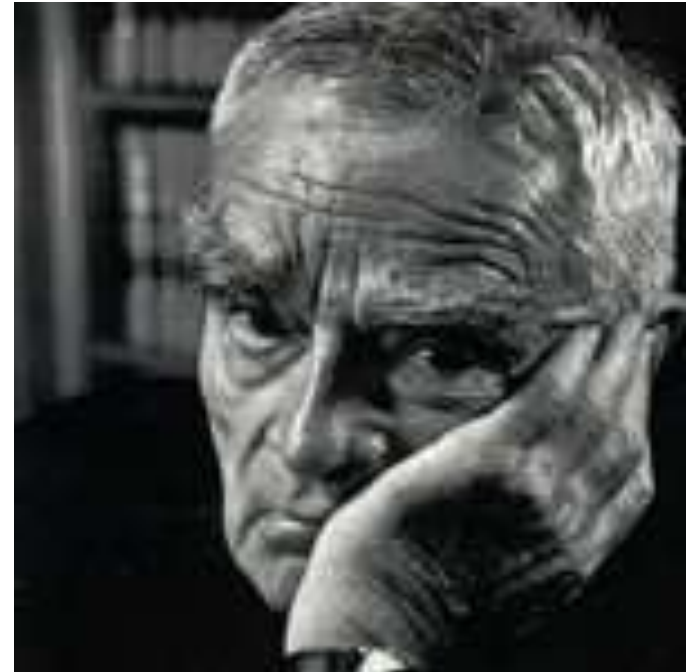
# Informed Consent

- Majority test: what a reasonable physician (customarily) would disclose
- Patient-centered standard, which includes both objective (*Canterbury*) and subjective tests, requires disclosure of material risks
- Exceptions to disclosure allowed
- Plaintiff must show causation



# The Calculus of Risk

- Hand formula: liability if  $B < L \times P$ 
  - B is burden of precaution
  - L is injury
  - P is probability
- Applying Hand formula to real-world situations (information costs, incommensurability)
- Risk-Utility under Restatement

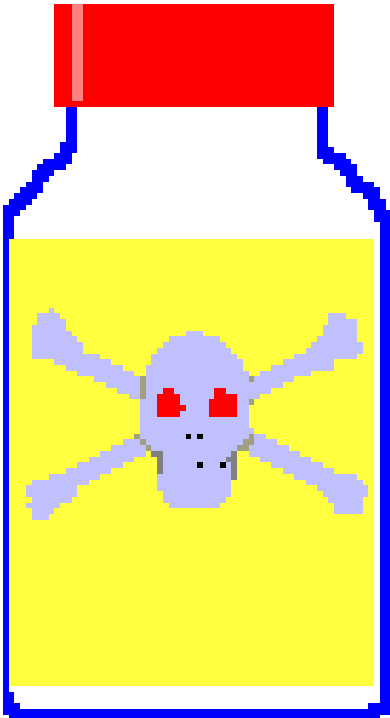


---

# Statutory Violations

- Courts may use statutes, regulations, and ordinances to establish standard of care
  - Statute is used as shortcut to reasonable person standard; the specific duty outlined in the statute replaces general common-law duty
  - Note different approach to licensing statutes
  - Note different approach to minors and statutory violations
-

# Threshold Issues



- Is plaintiff a member of the class of persons intended to be protected by the statute?
- Is the harm the kind that the statute was intended to protect against?

# Appropriateness of Adopting Criminal Standard

- Courts don't have to accept criminal standard as a standard for civil liability; criminal statute must provide appropriate basis for tort liability
- Factors to consider include
  - Pre-existing common-law duty?
  - Does statute clearly define prohibited or required conduct?
  - Direct or indirect relationship with harm?



---

# Effect of Statutory Violation

- Negligence per se
    - Statutory violation conclusive on whether defendant violated applicable standard of care
  - Rebuttable presumption
    - Presumption may be rebutted by party violating statute
  - Some evidence
    - Violation of statute provides some evidence of negligence
-

---

# Excuse under Restatement

- Excused violation isn't negligence
  - Restatement's non-exclusive list includes:
    - Violation reasonable because of incapacity
    - Actor neither knew nor should have known of occasion to comply
    - Unable after reasonable diligence to comply
    - Emergency
    - Compliance would involve a greater risk of harm
-

---

# Effect of Negligence Per Se

*Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274 (Tex. 1979)

Negligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person. The jury is not asked to judge whether the defendant acted as a reasonably prudent person would have acted under the same or similar circumstances; the statute itself states what a reasonably prudent person would have done. If excuse is not raised, the only inquiry for the jury is whether the defendant violated the statute and, if so, whether this was a proximate cause of the accident.

---

# Res Ipsa Loquitur

## The Thing Speaks for Itself



- Rule of evidence that permits jury to infer negligence based on the accident itself where direct evidence lacking
- Procedural impact of *res ipsa*: plaintiff eludes dispositive motions by defendant, gets case to jury

# Res Ipsa Requirements



- Instrumentality causing injury must be under exclusive control of defendant
- Accident wouldn't ordinarily occur without negligence

# Res Ipsa: Type of Accident

Restatement 2d, sec. 328D

- Event must be one that does not ordinarily occur unless someone has been negligent
- Examples of events that occur without negligence
  - falling down stairs
  - tire blowing out
- Examples of events that don't ordinarily occur without negligence
  - elevator falling
  - boiler exploding
  - derailling train

---

# Procedural Impact at Trial

- Inference of negligence permitted by jury, not compelled, or
  - Presumption of negligence: jury must find negligence if defendant doesn't provide enough evidence to rebut presumption, or
  - Shifts burden of proof: defendant must prove by preponderance of evidence that injury wasn't caused by defendant's negligence
-

---

# Res Ipsa and Multiple Defendants

- Typically, *res ipsa* doesn't apply against multiple defendants
  - *Ybarra*'s narrow exception: where plaintiff in course of medical treatment receives unusual injuries while unconscious, all defendants who had control over body or instrumentalities that may have caused the injuries may be required to explain their conduct
-



---

# Negligence Per Se v. Res Ipsa

- Statutory standard defines what reasonably prudent would do
  - Procedural effect varies
  - Judge determines whether statute applies
  - Jury decides whether statute violated, causation, and damages
  - Rule of evidence prevents directed verdict despite plaintiff having no direct evidence of negligent conduct
  - Procedural effect varies
  - Judge determines if res ipsa applies
  - Jury decides negligence, causation, and damages
-